No. 11,449

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

FLOTILL PRODUCTS, INC.,
Respondent.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL, and CALIFORNIA STATE COUNCIL OF CANNERY UNIONS, AFL,
Plaintiffs in Intervention,

vs.

NATIONAL LABOR RELATIONS BOARD,
Defendant in Intervention.

BRIEF FOR INTERVENORS.

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I. STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked by petitioner, as we understand its position, under Section 10 (e) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C. 160(e)) hereinafter called the "Act". The Act was amended by the Labor Management Relations Act of 1947. (Pub. L. No. 101, 80th Cong., 1st Sess., June 23, 1947, 61 Stat. ....., 29 U.S.C.A. Sec. 141 et seq. (1947 Supp.).)

II. STATEMENT OF THE CASE.

This case will test before this Court the legality of a doctrine of the National Labor Relations Board that induced a break-down of the National Labor Relations Act in one of the nation's leading industries.

Because of its insistence upon an unrealistic approach to the problems presented to it, the Board placed the employers and workers in the canning industry of California, including both the respondent and intervenor here, in an impossible position. It denied to the employees in the industry, as well as in respondent's plant, the right to be represented by an authorized collective bargaining agency for a period commencing March 1, 1946, and not terminated to this very date. Indeed the proceedings which the Board undertook in this case began in July, 1945; yet at this writing, three years later, the Board has made no determination as to which, if any, bargaining agency may represent these workers.

The record of the Board, we believe, presents a failure of the administrative process. Although the National Labor Relations Act contemplated the designation of a collective bargaining agency by the workers, that purpose here has been frustrated. Because of its misinterpretation of the Act, the Board, instead of bringing about orderly collective bargaining, prevented such bargaining and endangered continued production in the canning industry of California. To this day the Board has designated no bargaining agency but, on the contrary, persists in charging the existing agency and the employers with accusations of unfair labor practice such as those herein involved.

The history of this case begins in 1939 when the company entered into an agreement with a local union of the A. F. of L. (R. 267, 311) designated as Federal Local 20676. The contract which the company consummated with this union, dated March 1 of that year, ran from year to year thereafter unless cancelled upon thirty days' prior notice by the parties.

In subsequent years the company continued to bargain with Local 20676. While the basic terms of employment were fixed by a master contract entered into between the employers' association, California Processors and Growers, Inc., hereinafter referred to as C. P. & G., and the union's representative, the California State Council of Cannery Unions (R. 304, 312), Flotill Products retained its independent status, stipulating to accept such terms as the master contract provided. In 1941 the company's stipulation provided likewise for a so-called closed shop for the employees. The supplement set forth that all employees were to join or be members of the union before commencing work and that they were to remain as members of the union for the duration of the contract. The company was also to deduct membership dues and individual fees from wages. (R. 276.)

The local and the company renewed their stipulation in 1943, accepting an amendment to the master contract of that year. The supplemental memorandum of 1941, providing for a closed shop, remained in effect concurrently with the various master contracts.

The basis of the Board's case lies in the pendency of representation proceedings initiated in July, 1945, when an independent union, the Cannery and Food Process

Workers Council, filed a petition for certification covering the Flotill plant, as well as many plants in C. P. & G. (R. 87.) In the ensuing consolidated proceedings AFL and C. P. & G. objected to the petition upon the ground that it sought certification upon bargaining units consisting of certain designated areas in the Sacramento Valley rather than the territory covered by the functioning employer association and union council bargaining agencies. (R. 500.) After hearings were concluded and the matter lay undecided, FTA-CIO "intervened" in the dormant proceedings in August, 1945, and induced the Board to hold new hearings. (R. 501.) The Board permitted the intervention without the usual showing of substantial interest by the FTA-CIO prior to the hearing. (R. 29, 495.) Despite the strenuous objections of the AFL and the employers to these irregularities, and despite their contention that the election should not be held at so late a date in the season, the Board ordered the election in October, 1945.

The Flotill workers voted on October 15, 1945. (R. 325.) Of 205 valid votes cast AFL received 105, CIO 100, and the Independent none. Because of the Board's further irregularities in conducting the election, AFL filed objections to it (R. 474), and the Board on February 15, 1946, in its "Supplemental Decision and Order" (R. 48-67) sustained the objections.

The Board specifically found that the AFL's objection that the election had been held at too late a date would necessitate in another election balloting during the height of the ensuing season. (R. 266-67.) Recognizing that the existing contract would be enforceable until

March 1, 1946, the Board realized that a period of at least four months would expire before the peak of the season when the next election could be held, and "with considerable reluctance" (R. 58) it ruled that "none of the unions is entitled to exclusive status after the bargaining date". The Board went on to say (R. 58, 59):

> "In accordance with well-established principles, the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as a representative of its members. In this state of the record no legal effect may be given the closed-shop provision contained in the current collective agreements after their expiration date; the inclusion of any such provision in any new agreements, or action pursuant thereto, would clearly be contrary to the proviso in sub-section 8 (3). Nothing in our decision, however, should be construed as requiring any change in the substantive conditions now existing by virtue of the foregoing agreements."

The Board subsequently ruled that this portion of its opinion did not constitute an "order" upon the employers but merely a statement of what the Board believed to be the law. (R. 97, 98.)

It will be remembered that the 1941 existing closed shop contract of respondent and AFL provided for self-renewal unless terminated prior to March 1 of any year. Consequently on March 1, 1946, in order to comply with the Board's "suggestion," the company would have been compelled to refuse to recognize the incumbent bargaining agency, unilaterally to give notice of termination of the existing contract and to disrupt the extant conditions of

hiring and employment. AFL insisted that the employer would frustrate its bargaining obligations if it undertook any such revolution in its relations. As a result the employer continued the existing conditions and reaffirmed the union security provisions of the 1941 contract by entering into the contract of March 5, 1946, which is the subject-matter of the present proceedings. (R. 91, 280.)

The C. P. & G., the association bargaining agency in the canning industry, facing a parallel problem, also concluded a union shop contract with the AFL in the same month of March, 1946. (N.L.R.B. & Bercut Richards Packing Co. et al., No. 9499 in the United States Circuit Court of Appeals for the Ninth Circuit.) The Board insisted this contract, like the Flotill contract, violated the Act. Claiming that the association transgressed an earlier consent decree, which in substance required C. P. & G. to abide by the National Labor Relations Act, the Board filed contempt proceedings under that decree in this Court. On July 15, 1945, this Court discharged the Board's rule to show cause and denied the Board's petition, and thus as we shall point out, *infra,* sustained the validity of the questioned contract.

Thereafter on August 31, 1946, the Board held the second election at the Flotill plant. Again the AFL received the plurality of the valid votes cast. 535 employees voted for AFL, and 358 for CIO. But this election was challenged by FTA-CIO in September, 1946, and the Board failed to act on the objections from that date until Jauuary 20, 1948, a period of almost a year and a half.

In the interval, as in the prior period, the Board imposed upon the parties an interregnum of no bargaining. Although as we have pointed out, the Board originally expected this period to be no longer than four months, it became no less than three years. Finally on January 20, 1948, upon petition of the AFL for certification, the Board dismissed the entire representation proceedings upon the ground that CIO had failed to comply with the Labor Management Relations Act of 1947. (Daily Labor Report, January 20, 1948, p. A-8.)

We believe that this record displays an administrative failure to effectuate the Act. Since July, 1945, when the first rival petitions for certification were filed, until the present date, the Board has not designated a collective bargaining agency to represent the employees. Although AFL received a plurality of votes in two elections, the Board has failed to certify it as the bargaining agency. The Board has not only visited upon the employees a three year period during which the purposes of the National Labor Relations Act have been frustrated, but it has taken the second affirmative step of attempting to prevent the employer for a period of over two years from exclusively recognizing the labor union with which it had previously contracted for a period of over five years. The administrative break-down is not only a matter of history; the Board has still failed to name a bargaining agency, and its last act in the matter was to dismiss AFL's motion to be certified.

We submit this record emanates from the first irregular intervention of the Board at the instance of FTA-CIO when it permitted that union to intervene in the repre-

sentation case; that it was compounded by the Board's calling of an election at a time when the season had practically concluded, and by an irregular conduct of that election; and that it culminates in its present order. During this entire period of time the workers were denied their right of collective bargaining despite the fact that this Court did not support the Board's position in that respect and despite the fact that the Board's cease-bargaining rule cannot be supported in policy, in the Board's rules or cases, or in the decisions of the Court.

We believe and shall point out that the Board has brought about this unfortunate debacle by a rigid application of a doctrine which necessarily in this case, or any other, would produce the frustration of collective bargaining. If ever there was a record which proved that fact this three-year instance of failure of the Board's process does so.

III. STATEMENT OF THE ISSUE.

This proceeding emanates from charges filed with the Twentieth Regional Office of the National Labor Relations Board on March 19, 1946, by FTA-CIO, which alleged that the contract of March 5, 1946, violated Section 8 (1) of the Act; that the company granted AFL access to the plant and afforded it other assistance while refusing such privileges to the FTA-CIO; that it violated Section 7 of the Act by discharging an employee, one Sandrio, on November 17 or 18, 1945, and that it urged employees not to affiliate with CIO but with AFL. (R. 1.) The regional office issued a complaint including these

various charges. (R. 5.) The Trial Examiner only partially sustained the complaint, holding that the respondent be prohibited from entering into any exclusive contract with AFL, from recognizing AFL as the exclusive representative of its employees, and from interfering with FTA-CIO (R. 102, 103) but dismissing the remainder of the complaint. On August 19, 1946, the Board affirmed the ruling of the Trial Examiner and ordered "the complaint insofar as its allegations that the respondent discriminated against its employees within the meaning of Section 8 (3) of the Act be dismissed." (R. 83.)

The issue before this Court resolves into the question of whether or not the employer's continued recognition of an incumbent union and the reaffirmation by contract with it of extant conditions of hiring violates the National Labor Relations Act because the employer, in the words of the Board (Brief, p. 6) "knew that a representation question was pending" by reason of the claim of a raiding CIO union.

IV. ARGUMENT.

The Board contends that "execution of the contract of March 5, 1946, interfered with the employee's freedom of choice, in violation of Section 8(1) of the Act." (Brief, p. 8.) Section 8(1) of the Act provides that it shall be an unfair labor practice "to interfere, restrict or coerce employees in the exercise of the rights guaranteed in Section 7." Section 7 frames the right of employees to select representatives of their own choosing.

There is not a single word in the Act stating that the bargaining relationship between a recognized union and an employer must terminate upon the expiration of an existing contract after another union challenges its majority status.

This doctrine, fashioned by the Board out of whole cloth, is nothing less than attempted administrative legislation. Evidently the Board is so anxious to preserve an alleged "right of free choice" (Brief, p. 8) on the part of the employees that it is willing to strike down the union previously selected through an exercise of that free choice.

This proposed administrative legislation of the Board is vague and diffuse. The Board does not define when the challenge of the rival union destroys the bargaining relationship of the recognized union. Does the nullification occur when the challenger presents a claim to the Board that it represents the employee? Does it take place after the Board makes an investigation and determines to proceed with an election? Does it operate only when the employer is notified that the challenger has presented the claim or that the Board has determined to proceed? Does it eventuate if the employer learns of the challenger's claim indirectly without official notice from the Board?

Suppose the employer and the incumbent union agree to continue an expired contract after a rival union makes a claim of representation but before the Board finds that there is an insufficient showing by the rival union to justify an election. Would the continuation of the

contract during that interim constitute an unfair labor practice?

Although the Board seeks to legislate, it does not define the limits of its doctrine, but leaves the parties, instead, in the untenable position of acting *in terrorem* of future unfair labor practice charges.

We submit that the Board's inclusion in the Act of this new provision finds no support in policy, in its own decisions, or in the rulings of the Courts.

A. THE BOARD'S NULLIFICATION OF A RECOGNIZED UNION'S EXCLUSIVE RIGHT TO BARGAIN WITH THE EMPLOYER AFTER THE CHALLENGE OF A RIVAL UNION CANNOT BE JUSTIFIED BY CONSIDERATIONS OF LABOR RELATIONS POLICY.

The "basic doctrine of neutrality" invoked by the Board does not sanction the termination of industrial government through collective bargaining at the instance of the challenging union.

As we shall point out, the Board's "doctrine" would endow a challenger with bargaining rights despite the fact that it made only a minority showing; the doctrine would establish an unworkable multiple representation and multiple grievance procedures; it would encourage industrial strife; it would practically prevent collective bargaining in a seasonal industry, and finally it is wholly unnecessary to a free expression of choice of a bargaining representative by the workers.

1. **The Board's order assumes that the challenger has a sufficient following to justify the revocation of the certification of the union which the Board previously found represented a majority of the workers; yet the challenger makes only a minority showing.**

The Board's position reposes in a minority of the workers the power to thwart the will of the majority. Upon a showing of 30% of the employees in the bargaining unit, the Board will direct an election, and coincidentally prevent the certified union from continuing to represent the workers after an existing contract expires. It may very well be that the challenger never wins the support of more than the 30% minority, and it may even lose that support in an election. Indeed many challengers lose in subsequent elections. Yet the Board grants the minority union the power to disrupt the majority union's right to continue to represent the workers.

This implied revocation of the majority union's certification violates the precept of the Act that the majority of the workers have the right to choose and to enjoy the protection of a collective bargaining agency. It reverses the presumption that a state of facts, once found, continues to exist; it illogically gives the benefit of the presumption to the challenger, holding that it, just as much as the confirmed representative, represents the majority of the workers.

The fact that the Board intervenes on behalf of the challenger, setting aside in this case a long-standing relation of employer and incumbent union, gives a definite advantage to the challenger. By the very act of the challenge it has prevented the employer and the incumbent from continuing to deal. The attacking union

will exploit this fact with propaganda to the effect that the N.L.R.B. no longer permits the incumbent to represent the workers and that it cannot extend or renew the existing contract or enter into a new one. By this means the rival union shakes the confidence of the workers in the established agency. The Board has apparently gone over to the challenger's corner, and the workers become confused by the umpire's act of favoritism.[1]

There is no warrant in the Act to frustrate the choice of the majority and to prevent it from functioning upon the challenge of a minority.

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[1]The National War Labor Board ruled in a number of cases that during the pendency of proceedings before it the *status quo* should be maintained and that existing agreements should be extended for such period. In *National Carbon Co.*, 14 War Labor Rep. 21 (1944), Chairman Taylor speaking for Board said:

> "The Board believes that as a general rule the status quo at the expiration date of a collective bargaining agreement should be maintained pending the completion of a new agreement of final settlement of any issues in dispute. This policy reflects the consistent attitude of governmental authorities in similar situations and is identical with the procedure voluntarily adopted by many employers as a means of maintaining stable and harmonious relations with responsible unions which represent their employees in collective bargaining. By following this policy the Board does not prejudge contests over such matters as majority status or union responsibility but merely postpones final argument and decision thereon until after the case has been fully argued on the merits before a panel or other instrumentality of the Board. The policy of the Board, as thus outlined, corresponds with the traditional practice of our courts to maintain the status quo of the subject matter in dispute pending a final determination of the case on its merits."

See also: *In re Montgomery Ward & Co.*, 13 War Lab. Rep. 454 (1944); *United States Automatic Transp. Co.*, Case No. 2570-CSD (Dec. 14, 1944) (unreported); *Western Union Telegraph Co.*, 13 War. Lab. Rep. 297 (1943); *Lamson & Sessions Co.*, 8 War Lab. Rep. 295 (1943).

2. The Board's order providing for multiple representation and grievance procedures attempts to establish an impossible practical situation in violation of the Act.

The Board's supplemental decision and order (R. 58-59) provides:

> "In accordance with well-established principles, the employers may not, pending a new election, give preferential treatment to any of the labor organizations involved, although they may recognize each one as a representative of the members."

The Board thus directs the employer to deal with three unions; it decrees a legally sanctioned triple unionism. The Board seeks to erect a condition which is unworkable from a practical standpoint and unsupportable legally.

Labor relations are dynamic and call for a succession of day to day adjustments reaching from agreements on wage and manpower problems to the gamut of adjustments made through the grievance machinery. Indeed, over a period of years, such as has expired here between the filing of the petition of FTA-CIO and the present time, the problems will range far beyond those solved through the grievance procedure. The grievance machinery itself is a form of government as essential to industrial order as the maintenance of the judicial system is to civic peace and stability.[2]

To split industrial government into autonomous and competing systems is to set the stage for chaos. In the

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[2]One of the purposes of the Railway Labor was "the prompt and orderly settlement of all grievances". See *Lapp, How to Handle Labor Grievances,* 11, 12 (1945).

first place the very value of the grievance machinery lies in the establishment of uniform decision and the building of precedent. Interpreting the collective bargaining contract, the grievance board will build a body of decision that defines the rights and duties of the parties. With three such procedures working simultaneously and independently, uniformity becomes impossible because each board may reach a different and opposing decision.[3]

In the second place, the competitors here are not disinterested neutrals but fervid contestants each trying to displace, and indeed to liquidate the other. Each union will use every complaint of a member to build up a grievance which it will vigorously press for adjustment, in the hope of winning a competitive advantage over its rival. Each grievance becomes a *casus belli,* a stepping stone to the embarrassment of the rival union, a source of dissension. Thus the Board transforms the instrumentality of the grievance machinery from a method of promoting industrial peace to a means of insuring industrial discord. No industry could live under a regime charged with such dynamite.

Not only does the Board create an impossible practical situation; it likewise violates its own mandate. The Act provided for a system of majority rule in labor relations; the majority's choice was to be the exclusive

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[3]In *Order of Railroad Telegraphers v. Railway Express Agency, Inc.,* 321 U.S. 342 at 346, 64 S. Ct. 582 (1944), the Supreme Court said that deviations from the interpretations of the collective bargaining contract by the contracting union "introduce competitions and discriminations that are upsetting to the entire structure".

representative; yet the Board's present decree fixes a form of proportional representation.[4]

That Congress intended no statutory sanction of such plural representation,[5] but the very opposite, is proven

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[4]The United States Supreme Court has recognized the importance of collective bargaining by the majority rather than the execution of separate labor contracts by individual workers, and it has determined that the Act contemplates the former and not the latter. In *J. I. Case Company v. N.L.R.B.*, 321 U.S. 332 (1944), cited in Board's Brief, p. 12, Justice Jackson speaking for the Court said:

> "It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment."

[5]The Senate Report (S. Rep. 573, 74th Cong., 1st Sess., p. 13 (1935)) on the National Labor Relations Act said:

> "Since it is well-nigh universally recognized that it is practically impossible to apply two or more sets of agreements to one unit of workers at the same time, or to apply the terms of one agreement to only a portion of the workers in a single unit, the making of agreements is impracticable in the absence of majority rule. And by long experience, majority rule has been discovered best for employers as well as employees."

The House Report (H. Rep. 1147, 74th Cong., 1st Sess., pp. 20, 21 (1935)) read:

> "There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor organization negotiating the agreement there would immediately result a marked increase in the membership of the labor organization. On the other hand, if better terms were given to non-members, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.
>
> "* * * If, however, the company should undertake to deal with each group separately, there would result the conditions

by the Congressional record at the time of the passage of the Act.

To enforce the Board's order would therefore violate the very purpose of the Act: exclusive representation by the majority agency. To decree that during the interval from a petition for certification and the designation of a representative, the established union cannot continue to serve but that representation must be fractionalized is to require a period of unremitting conflict during which the grievance machinery becomes a weapon of warfare. How could a cannery, dealing with a seasonal and perishable crop, operate, when each side is legally delegated to compound grievances and to demand representation of its constituency? Each contender would beset management with a myriad of demands and a succession of threatened stoppages, making production of a perishable product a matter of uncertainty and improbability.

The Board has no excuse in theory, law or practice to attempt to impose such an impossible condition upon one of California's chief industries.

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pointed out by the present National Labor Relations Board in its decision in the Matter of Houde Engineering Corporation (1 N.L.R.B. 35 (Aug. 30, 1934)):

"It seems clear that the company's policy of dealing first with one group and then with the other resulted, whether intentionally or not, in defeating the object of the statute. In the first place, the company's policy inevitably produced a certain amount of rivalry, suspicion, and friction between the leaders of the (twenty-one) committees * * * Secondly, the company's policy, by enabling it to favor one organization at the expense of the other, and thus to check at will the growth of either organization, was calculated to confuse the employees, to make them uncertain which organization they should from time to time adhere to, and to maintain a permanent and artificial division in the ranks."

3. The Board's order encourages industrial strife and invites internecine union struggle.

As the Labor Management Relations Act of 1947[6] decrees, one of its purposes is to encourage the practice and benefits of collective bargaining. (Section 10.) Through the instrumentality of the collective bargaining contract the social losses of industrial warfare have been reduced and many times avoided.[7]

When the collective bargaining contract collapses labor relations are reduced to chaos. In the absence of a method to adjust their disputes the workers have recourse only to strikes and stoppages.[8] Each grievance

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[6]Pub. L. No. 101, 80th Cong., 1st Sess. (June 23, 1947), 61 Stat. ....., 29 U.S.C.A. Sec. 141 et seq. (Supp. 1947).

[7]The Circuit Court of Appeals for the Fourth Circuit states:

> "The purpose of the written trade agreement is not primarily to reduce to writing settlements of past differences, but to provide a statement of principles and rules for the orderly government of the employer-employee relationship in the future * * * it provides a framework within which the process of collective bargaining may be carried on." *N.L.R.B. v. Highland Park Mfg. Co.*, 111 F. (2d) 632, 638 (C.C.A., 4th, 1940.) See *Perlman & Taft, History of Labor in the United States, 1896-1932*, p. 10 (1935).

[8]Chief Justice Stone, speaking for the Supreme Court in *Steele v. Louisville & Nashville R.R. Co.*, 323 U. S. 192, 65 S. Ct. 226 (1944), points out that the elimination of a collective bargaining representative for a craft or minority thereof leaves to it "the only recourse * * * to strike, with the attendant interruption of commerce, which the Railway Labor Act seeks to avoid". This fact was recognized by the National War Labor Board in the *National Carbon Co.* case, supra, footnote 1, where Chairman Taylor said:

> "It has become increasingly evident that lack of contractual relationship between employers and employees defining wages, hours, and working conditions in the interim pending the completion of a new contract, creates a feeling of uncertainty on the part of employees which adversely affects production and harmonious relations within the plant. Experience has demonstrated, furthermore, that this uncertainty reflects itself in the atmosphere of collective bargaining and lessens the chances for a peaceful and speedy disposition of issues in dispute."

becomes a potential work stoppage. The workers' knowledge that they have no definite means for the presentation of their position in any dispute leads to psychological uncertainty. Out of this welter of insecurity come strikes and disorders.

Indeed, in this case the questioned contract provided that for its duration, the union would not strike. The Board must, if it follows the doctrine that the whole contract with AFL falls, contend that the no-strike clause falls, too. The Board's reasoning, then, leads to the destruction of this protection of industrial peace, although the preservation of that peace is one of the basic purposes of the Act.

Under the Board's doctrine this unhappy state of possible discord may be long-continued. After the holding of an election, the certification of the winning union may be delayed. The election may be challenged; the very process of investigating the challenge may be time-consuming. If the challenge to the election is sustained, another election must take place. In this very case the petition was filed in July, 1945; the first election took place in October, 1945; the election was challenged; the Board sustained the challenge on February 15, 1946; a second election occurred in September, 1946; this election in turn was challenged, and in January, 1948, the Board, throwing its administrative hands into the air, dismissed the whole proceeding, failing to certify a bargaining representative. Hence almost *three years* passed between the petition and the final debilitory order.

The Board ordered that the parties could not recognize their contract after its expiration in March, 1946. Hence

the Board decreed an interregnum of chaos for a period of almost *two years.*

Moreover, the Board's offer of equal bargaining status to a challenging union is an invitation to inter-union warfare. The Board sets up inducements to raiding by unions when it gives such a union the power to deal with the employer. The rule of the Board, perhaps originally fashioned to reduce the power of a company-dominated union, becomes anachronistic in a day when company unions are few and inter-union rivalries many.[9] At a time when every effort is extended to prevent jurisdictional strife, the Board encourages it.[10]

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[9]The Board has itself recognized the value of stability of industrial relations in the Matter of *Reed Roller Bit Company*, 72 N.L.R.B. 927, wherein it upheld a contract of two years' duration as a bar to a rival union's petition for certification. The Board said, at p. 930:

> "For large masses of employees collective bargaining has but recently emerged from a state of trial and error, during which its techniques and full potentialities were being slowly developed under the encouragement and protection of the Act. To have insisted in the past upon prolonged adherence to a bargaining agent, once chosen, would have been wholly incompatible with this experimental and transitional period. It was especially necessary, therefore, to lay emphasis upon the right of workers to select and change their representatives. Now, however, the emphasis can better be placed elsewhere. We think that the time has come when stability of industrial relations can be better served, without unreasonably restricting employees in their right to change representatives, by refusing to interfere with bargaining relations secured by collective agreements of 2 years' duration."

[10]Gerhard P. Van Arkel, when serving as General Counsel for the NLRB and appearing as such in the Board's brief filed herein, expressed the reasons for the Board's change in policy, upon the problem of stability in labor relations, and indicated disagreement with procedures which would encourage inter-union rivalry in an address delivered November 7, 1946, at Washington, D. C., at a conference of labor attorneys, from which we quote extracts:

> "In these respects and in substantial measure, therefore, *Board policy has been moving away from an early concept*

The Board's rule would destroy the industrial peace assured by the collective bargaining contract during the long period of representation proceedings. The Board

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of unfettered freedom of choice in the direction of limited access to its services. The motivating factors, sometimes expressed and sometimes inchoate, which lie behind these changes and which illustrate the accommodation of law to experience of which I have earlier spoken appear to me as follows:

"1. The fact, already mentioned, of the increase in trade union membership and collective agreements. With only the rarest exceptions, the company-dominated union and the employee representation plan are things of the past; equally rare is the large industrial enterprise which is not operating under a collective bargaining agreement with a trade union. *Those agreements raise vested interests, quite as tenaciously fought for as any more clearly recognized property right;* a union which has spent large sums of money, expended many hours of labor, and struggled for a long period of time to establish itself does not willingly bow out to a newcomer. The employer has a strong stake in the continuance of such a relationship once established; for he, too, will have devoted much of his time and that of his supervisory staff to building up workable relationships; only unwillingly, normally, will he forsake that investment in order to begin anew with different representatives. The public, as well, has its interest in a stable relationship, but subject to change at whim.

"2. The fact, too often overlooked, that *employees have considerable freedom to change representation within their own organizations.* . . .

"3. *The unhappily increasing, rather than diminishing jurisdictional strife between the American Federation of Labor and the Congress of Industrial Organizations.* One may agree that competition within the labor movement is as healthy as it is in the business world without agreeing that cut throat competition is desirable in either. Some unions are approaching a position where their major effort, money, and time are expended in resisting, or in engaging in, raiding tactics rather than in the purposes for which they were organized. Without attempting to cover the entire problem, it does seem to me that the most useful contribution which the Board can make is, generally speaking, in *protecting the position of a union which has achieved a recognized position and stable bargaining relationships with an employer, rather than becoming the ally of him who seeks change.*" (Italics ours.) 19 LRRM 130.

would also encourage jurisdictional raiding. Neither of these results are compatible with the purposes of the Act.

4. The Board's doctrine would make it a practical impossibility to determine a bargaining representative in a seasonal industry, such as the canning industry of California.

The ruling of the Board that the existing relationship is destroyed by the filing of a petition for certification subjects the canning industry of California, in particular, to dissension and discord in perpetuity.

During the past five years AFL and respondent have entered into collective bargaining negotiations and consummated collective bargaining agreements prior to March of each year. Due to the pressure of high production during the season, it is impossible at that time to work out a collective bargaining contract, and it has therefore been the practice of the industry to consummate such contract prior to the height of the canning season. In the event that a petition for certification could arrest the process until an election were held and the Board certified a collective bargaining agency, the industry would be subjected to endless dissension. A rival union could file a petition at any time during the year; an election could only be held during the summer months when the canneries were all operating; certification could be delayed by objections and investigations by the Board and, as a consequence, no bargaining agency would be permitted to function during the actual canning season.

The filing of such petitions could be repeated year after year and collective bargaining in the industry virtually eliminated. Such a prohibition of collective bargaining

in the canning industry over the years, with the consequence of disordered industrial relations and labor unrest, would seriously jeopardize one of California's principal industries. Notwithstanding the frustration of collective bargaining hereinabove described, and notwithstanding the violation of the purpose and provisions of the National Labor Relations Act thereby effected, the Board has attempted to enforce an order bringing about these very results.

5. **The employer's continued dealing with the certified agent does not interfere with a free expression of choice by the workers.**

So long as the workers have the full and free right to proselytize, campaign and vote for the challenging union, it is hard to see how their choice of a bargaining agency could be adversely affected by the continuation of the existing bargaining relationship.

We assume that any interference with such free choice is proscribed under the Rutland Court doctrine:[11] we probe here the narrow question whether the employer and the union can continue to handle their mutual problems and to contract. Of course any discharge of an employee because of union activity is unlawful. But must the incumbent union's right to deal with the employer also be excorcised?

We have pointed out the bargaining contract composes a kind of government for labor relations. There is no good reason why this government should be liquidated

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[11] *Matter of Rutland Court Owners, Inc.*, 44 NLRB 587 (1942), 46 NLRB 1040 (1943).

because an election has been called. It is certainly not customary in American political life for an incumbent to be removed from office because some one decides to run for his position. Nor has the incumbent's retention of office been a sinecure to reelection; in American history, incumbents have lost as often as they have won.

In labor relations the challenger has a great and inherent advantage which he may not enjoy in political life. The underlying drive of American workers, since labor unions began, has been for higher wages and better working conditions. The in-union, which has the responsibility of living up to settled contracts, which must maintain harmonious relations and which has a record in the shape of the contract, cannot compete with the challenger in promising "better and more." The challenger, free and footloose, can promise pie in the sky.

Indeed the very right for which the incumbent and the employer contend here will not benefit but harm the incumbent in getting votes. While we believe that continued relationships, during election interims, is highly necessary to industrial peace, we do not think such continuity helpful to the incumbent union in the campaign. For its efforts to continue industrial government, it will be charged, as this AFL cannery union was charged, with "lying in bed with the employer", with making deals with the employer, and with a multitude of forms of corrupt action. Thus the challenger will exploit to its advantage every attempt by the incumbent to preserve order and to avoid interruptions of production.

The task of collective bargaining obviously calls for mutual concession by employer and union. This process

may extend through a relatively long interval between petition and certification. The challenger will seek to convert each effort or concession for reconciliation into votes of censure. Hence the incumbent, striving for industrial peace, may suffer with the electorate.

The Board has made a fetish of an academic neutrality; it ignores the reality and misconstrues the continued relationship into a great advantage to the incumbent, whereas, in fact, it may sometimes be a detriment.

In conclusion, we submit the Board's thesis finds no support in policy. In effect it disrupts the representative chosen by the majority upon the challenge of a minority and prevents the functioning of the selected bargaining agency. In its place the Board would set up a multiple administration of labor relations which is not only impractical but also incompatible with the majority representation provided by the Act. The doctrine encourages industrial strife by removing the protection of the collective bargaining contract and by encouraging jurisdictional raiding. It imposes an unworkable practical situation in a seasonal industry. Finally the Board's rule is not necessary to insure a free expression of choice by the workers.

We believe the Board has at least partially recognized these narrated dangers. As a result, the Board has itself recently retreated from and partially abrogated the position it took in this case.

B. THE BOARD ITSELF IN DECISIONS RENDERED SUBSEQUENT TO THE INSTANT ONE, AS WELL AS IN THE PRESENT PROCEEDINGS, HAS REJECTED ITS NULLIFICATION OF BARGAINING THEORY.

The Board's dual contradiction of its present position appears in some of its recent cases and in its treatment of the instant matter; we now consider separately each of these subjects.

1. Since the rendition of its decision in the instant case, the National Labor Relations Board has recognized the danger of its doctrine of prohibition of collective bargaining during representation proceedings and has partially repudiated that doctrine.

In three decisions since the ruling in the instant case the National Labor Relations Board has questioned its own attempt at administrative legislation in prohibiting collective bargaining with the incumbent union during representation proceedings and has both repudiated and specifically limited the doctrine. We shall discuss these decisions in their chronological order.

The first is in the matter of *Ensher, Alexander & Barsoom, Inc.* and *Food, Tobacco, Agricultural* and *Allied Workers Union of America, CIO,* and *International Brotherhood of Teamsters, Chauffeurs, Warehousemen* and *Helpers of America, AFL,* and *California State Council of Cannery Unions, AFL,* and *Cannery Workers Union Local 857, AFL,* Case No. 20-C-1445, 74 N.L.R.B. 1443, a decision rendered on August 21, 1947, involving the same rival unions as appear in the instant proceeding.

The case is important in the first place because of the factors upon which the Board relied in reaching its con-

clusion that the complaint against the company should be dismissed. In alluding to the doctrine that exclusive collective bargaining is prohibited during a representation proceeding, the Board states, "That doctrine, necessary though it is to protect freedom of choice in certain situations, can easily operate in derogation of the practice of continuous collective bargaining, and should, therefore, be strictly construed and sparingly applied." (p. 1445.) This is an important recognition on the part of the Board of the desirability of the "practice of continuous collective bargaining." Here the Board officially acknowledges that its "doctrine" would, if flatly applied, prevent continuous collective bargaining.

It is true that the Board in the Ensher decision holds the doctrine not applicable because of the factual situation in that case, but its recognition of the danger of the doctrine extends beyond that case. The effect of prohibiting continuous collective bargaining is just as onerous and disadvantageous in other factual situations as in the *Ensher* case.

In the second place, the decision of the Board in the *Ensher* case exposes the weakness of the Board's position here. In the *Ensher* case the Board dismissed the complaint on the ground that there was no real question of representation pending since the challenging union, the Independent, which had appeared on the petition in the election of October, 1945, "became defunct shortly after that date." (p. 1444.) Hence, states the Board, the employer did not commit an unfair labor practice when he signed a contract with the labor organization "claiming

to represent its employees". The Board sustained the position of the employer because—

> "There is no allegation in the complaint and no evidence that the AFL did not represent a majority of the respondent's employees at that time, or that the unit covered by the contract was inappropriate. The respondent asserts that, because of the victory of the AFL in the election of October, 1945,[5] and the respondent's bargaining history with the AFL,[6] it believed in good faith that the AFL continued to represent a majority of the respondent's employees on February 27, 1946. (p. 1444.)

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[5]Of 96 valid votes counted, 64 votes were cast for the AFL, 28 votes were cast for the Independent, and 4 votes for neither labor organization. In our Supplemental Decision and Order, issued on February 15, 1946, the Board vacated this election, as well as other elections involving employer members of the CP&G unit and other independent companies, at the instance of the AFL, because of certain procedural defects concerning eligibility to vote. *Matter of Bercut-Richards Packing Co. et al.*, 65 N.L.R.B. 1052.

[6]The respondent had had exclusive bargaining agreements with the AFL continuously at least since 1941."

Each of the reasons which the Board sets out to exonerate the employer in the *Ensher* case, applies to the employer in the instant case.

First—there is no *allegation* in this complaint that the AFL did not represent a majority of the representative employees at the time the contract was signed.

Second—there is no *evidence* that the AFL did not represent a majority of the employees at the time the contract was signed.

Third—there is no allegation in the complaint and no evidence that the unit covered by the contract was *inappropriate.*

Fourth—the respondent asserted here that because of the victory of the AFL in the election of October, 1945, he believed in *good faith* the AFL continued to represent a majority of the respondent's employees on March 5, 1946. Indeed in the instant case the AFL won the election of October, 1945, obtaining 105 as against 100 of the 205 votes case. (R. 325.) The employer's honest belief in the continued majority of the AFL is corroborated not only by this October, 1945 vote, but by the fact that the election of September, 1946, gave AFL 535 votes as against CIO's 358.

Finally the respondent asserts here that because of its *bargaining history* with AFL it believed in good faith AFL continued to represent a majority of its employees. It is noted in the *Ensher* case that respondent had had effective agreements with the AFL continuously since 1941. In the instant case respondent had had effective bargaining agreements with AFL continuously since the same year of 1941. (R. 275.)

Each of the foregoing circumstances composed the reasons why the Board dismissed the *Ensher* complaint. The decision stated "under these circumstances we do not believe that the respondent's execution of the contract with the AFL on February 27, 1946, should be regarded as an unfair labor practice, even though it be technically true that the representation proceedings was still pending before the Board." (p. 1445.)

Each of these reasons, as we have noted, were equally applicable in the present situation. Although the Board points out in the *Ensher* case that the Independent was

defunct when the contract was signed, the CIO did claim to represent the employees prior to the election of September, 1946, and on August 16, 1946, "the Board granted CIO a place on the ballot." (p. 1449.) It was on the basis of the pendency of these representative proceedings that the Trial Examiner in the intermediate report held that an unfair labor practice had been committed. Yet the Board, recognizing the force of the above mentioned facts as to the employer's good faith, dismissed the case, despite the fact it was "technically true that the representation proceedings (were) still pending." The Board found the value of continuous collective bargaining overcame any advantage derived from applying the doctrine which the Board urges here. There can be no doubt that the Board's position changed between August 19, 1946, when it rendered the *Flotill* decision and August 21, 1947, when it decided the *Ensher* case.

The Board's reluctance to apply the cessation of bargaining doctrine became even greater on February 11, 1948, when it rendered a decision in the case of *N. L. Koin,* et al., doing business as *The Ellis Canning Company* and *Warehousing, Processing & Distributing Union No. 217,* affiliated with *International Longshoremen's & Warehousemen's Union* (CIO). Cases Nos. 17-R-1339, 17-C-1383, February 11, 1948 (76 N.L.R.B. No. 13).

In this case the Board states the fact to be "that there existed a real question concerning the representation of the employees in question". It then recognized that its *Bercut Richards* decision (65 N.L.R.B. 1052), upon which the *Flotill* case rests, might lead to the conclusion that the employer had committed an unfair labor practice;

yet the Board upheld the Trial Examiner's following report:

> "Clearly respondent herein knew a 'real question' concerning representation existed when it agreed with the AFL in April, 1946, to enforce the closed-shop provision of its contract. Obviously also enforcing this provision was not extending or renewing an existing contract or entering into a new one. If knowledge of the question concerning representation forecloses the respondent from enforcing the closed-shop provision on request of the Union, the doctrine of the Phelps-Dodge case is extended. In other words in so holding the undersigned would be deciding that 'If, during the pendency of an election directed by the Board to resolve a question of representation, an employer extends or renews an existing contract, with a labor organization or enforces a provision of an existing contract not theretofore enforced since the signing of that contract—he violates the Act, insofar as that organization is accorded recognition—or employees are required to become or remain members thereof.' Such an extension of the recognized doctrine seems to the undersigned to be unsound. It would be holding that a respondent and a union representating its employees could never for any reason, however laudable, agree not to enforce a union security provision without danger of being forced to waive thereafter the provision if a rival union started organizing and filed a petition with the Board." (p. 10.)

The Board thus concludes that a change in actual conditions of employment, such as the enforcement of a closed shop provision which prior thereto had been dormant, would not constitute an unfair labor practice,

even though effected during the pendency of a representation proceeding. It refused to extend the "recognized doctrine" to a situation in which the employer affords the incumbent union the protection of a closed shop. The Board argues that in enforcing this provision it was not extending nor renewing an existing contract or entering into a new one. The prohibition as to exclusive bargaining, according to the Board, applied only to such extension or renewal.

We submit that the Board, in substance, rejected its own doctrine of cessation of exclusive bargaining. So far as the enforcement of the closed shop provision by the employer might be a violation of Section 8 (a) (1) of the Act, the *Ellis* decision is indistinguishable from the situation in which a closed shop provision was extended or renewed. To continue a closed shop provision which was being observed by the employer is certainly less of an interference with the so-called free choice of the workers than the imposition of a closed shop where none had been before. In the *Ellis* case the workers who had been employed under open shop conditions found themselves, after a rival union petition had been filed, faced with a closed shop. This change in the real conditions of employment is a far more drastic and important departure from neutrality than the continuation in the *Flotill* case of the same conditions as those which had been enforced for a prior period of four years.

It is no answer to say that in the *Ellis* case the dead letter of the contract provided for a closed shop and, therefore, the employer had the right to enforce it during the pendency of a proceeding. The alleged vice of the

action of an employer during the pendency of a proceeding lies in discrimination in favor of the incumbent union. The Board said that such discrimination here impaired the free choice of workers; yet in the *Ellis* case the discrimination, if any, would, according to the Board's theory, be twice as effective and consequently twice as unlawful and partisan. In the *Ellis* case the questioned action consisted not in maintaining existing conditions but in imposing an entirely new condition in favor of the incumbent union, and this new condition is nothing less than a complete closed shop.

In February, 1948, the Board again retreated from the cease-bargaining position. In the matter of *Eaton Manufacturing Company, Wilcox-Rich Division* and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America* (UAW-CIO), the Board rejected the position of a Trial Examiner who invalidated a contract with an incumbent union

> "* * * containing provisions which conditioned employment on continued membership in the AFL * * * in the face of the CIO representation petition and the CIO unfair labor practice charge, both of which were pending undetermined before the Board at the time the contract was executed, and at a time when the respondent was aware, as evidenced by the stipulation executed simultaneously therewith, that there existed a real question concerning representation affecting its Saginaw employees." (Intermediate Report, p. 24.)

The Trial Examiner condemned the contract in no uncertain terms

> "* * * under the circumstances and for the reasons expressed in the *Midwest Piping* case, the principle of which is clearly controlling here, the undersigned finds that the respondent, by its conduct in executing the Master Agreement in May, 1946, contravened the letter and spirit of the Act, breached its obligation of neutrality, indicated its approval of the AFL, accorded the AFL unwarranted prestige, encouraged membership in the AFL, discouraged membership in the CIO, and thereby rendered unlawful assistance to the AFL." (Intermediate Report, p. 24.)

Yet the Board rejected this conclusion, stating:

> "The Trial Examiner found that the respondent violated Section 8 (1) of the Act by executing the 1946 agreement with the UAW-AFL while the UAW-CIO's previously filed representation petition was pending before the Board undetermined. Because of the UAW-CIO's subsequent conduct in *preventing a prompt determination** by filing an unfair labor practice charge against the respondent which we find to be groundless, we do not adopt this finding." (Decision, p. 6.)

The Board held that the attacked contract with the incumbent union in the *Eaton* case was properly consummated despite the pending representation case of a rival union. The Board holds the representation proceedings were not promptly determined and therefore not a sufficient basis to invoke the *Midwest* doctrine. An even greater delay occurred in the present case. Whether the delay resulted from the nonaction of the rival union or the ineptness of the Board is immaterial. The Board in

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*The emphasis here and *infra* are our own.

the *Eaton* case holds delayed proceedings do not invoke the cease-bargaining doctrine and do not operate to defeat the rights of the incumbent union.

The *Eaton* case, in principle, is an abandonment of the *Midwest* doctrine. It is a further recognition by the Board, reached after its decision here, that the cease-bargaining doctrine is not tenable.

These recent decisions of the Board show that it coincidently questions and circumscribes the doctrine for which it contends so strenuously in the present case.

The Board is in a further contradictory position in the application to the present case of the rule that an employer is obligated by the Act to bargain with the existing agency.

2. The Board has not followed the cease-bargaining theory in the present proceedings.

The Board is in the position here of having ordered respondent both to bargain and not to bargain with AFL.

The Board has elaborated the duty to bargain collectively both in its reports and in the cases. The Board has ruled that this duty includes the obligation to negotiate concerning the modification, interpretation and administration of an existing agreement. (9th Annual Report, p. 46; 10th Annual Report, pp. 49, 50.) The Board's cases clearly enforce this obligation.[12] The duty to bargain, it will be noted, encompasses the administration of an existing collective bargaining agreement.

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[12]See for instance the following cases: *In the Matter of Golden Turkey Mining Co.*, 34 NLRB 760 (1941); *In the Matter of Eastern Supply Co.*, 47 NLRB 49 (1943); *In the Matter of Carroll's Transfer Co.*, 56 NLRB 935 (1944).

In this case the Board recognized the legal requirement to abide by the existing contract between the employer and the AFL despite the coexistence of a petition for representation.

Although the first election in this case occurred during the life of the contract, the Board ruled that the duty of the employer to bargain with AFL was not affected by the pendency of the representation proceedings.

The Board held that even if a new bargaining agency were selected, it would only function *after* the expiration of the existing contract. The Board stated:

> "However, any certification of representatives which may issue as a result of the elections hereinafter directed shall be solely for the purpose of designating a bargaining representative to negotiate a new agreement to become effective upon the *expiration* of the existing contract." (*Matter of Bercut-Richards Packing Co.*, et al., 64 N.L.R.B. 133.)

Hence the Board, following its own rule as to duty to bargain, instructed the employer to abide by its contract and to enforce and recognize it during the pendency of the proceedings. Now the Board reverses its position and holds the employer should *not bargain* during such proceedings with the union, with which it had entered into the contract. Is, then, the employer under a duty to bargain with the incumbent union or isn't it?

If the employer had failed to bargain with the incumbent union or recognize the contract during the period prior to March 1, 1946, the Board would have held it violated the Act. How does the continuation of that recognition now become a violation of the Act? The so-called

discrimination in favor of the incumbent union, which allegedly constitutes the vice of the employer's action, operated just as effectively prior to March first as subsequent to it.

The Board's answer (Brief, p. 30) is:

> "In the first place the Board, in its Supplemental Decision and Order of February 15, 1946, clarified the language quoted above by stating that any closed-shop features of the old contract could not be enforced as against those who supported the rival union in the election".

Yet the contract, extended during the interim period, was not to be enforced as against those who *supported* the rival union in the election. No one contends that AFL could invoke sanctions against those who voted for or were active on behalf of or supported the rival union.

The Board says:

> "Secondly, the Board noted (R. 58-59) that the old contract would come to a close in a relatively short time, during which few persons would be employed by reason of the supervening slack season." (Brief, p. 30.)

The nature of the alleged discrimination, however, does not vary because of the extent of its visitation. The charged violation of the Act can hardly be exonerated because it is short-lived. Nor because during the period of the violation "few persons would be employed", and therefore affected by it. Does the Act operate quantitatively; only if a certain number of employees, subsequently determined by the Board, suffer discrimination? Moreover the "few persons", employed in the "off

season'' actually constitute in number for the C. P. & G. unit, according to the Board's own official statement in the decision, direction of elections and order of October 12, 1945 (R. 32), four to five thousand employees, and it would seem that these ''few employees'' cannot be so cavalierly discounted.

The Board's final contention that the employees would be less affected by continued recognition of the old contract than by an extension of its terms is equally speculative. The Board argues the employees ''were aware'' of the existence of the old contract.

> ''They could, therefore, go into the election with a *free choice of alternatives,* knowing that their employer was not favoring the A.F.L. by merely permitting the contract to run out its term.'' (Brief, p. 30.)

But how did the extension of the extant conditions obliterate the ''free choice of alternatives''? That choice remained. Nor would the extension of effective and existing conditions show ''favoritism'' for AFL any more or less than enforcement of those conditions, *required by the Board's own order,* during the term of the contract.

The Board's recognition of the Act's precept as to duty to bargain, through sanctioning performance of the existing closed shop contract, during the pendency of representation proceedings, is squarely inconsistent with its present condemnation of the continued recognition of that duty through extension of the extant conditions of the contract during such proceedings.

We submit in conclusion of this phase of the matter that the Board twice contradicts itself. In the first in-

stance three Board cases, supplemental to the present one, have repudiated the cease-bargaining theory. In the second place, in the instant case, the Board has ordered the employer not to stop bargaining but to continue bargaining with the incumbent union until the "existing contract" expires. These recessions from the original doctrine prove the Board itself recognizes the danger of prohibiting collective bargaining during representation proceedings, and as a consequence is in the process of repudiating the theory it would ask this Court to apply.

We now point out that the Courts have likewise rejected the doctrine.

C. THE BOARD'S NULLIFICATION OF A RECOGNIZED UNION'S EXCLUSIVE RIGHT TO BARGAIN WITH THE EMPLOYER AFTER THE CHALLENGE OF A RIVAL UNION CONFLICTS WITH THE DECISION OF THE COURTS.

The Board and the Courts have consistently and universally recognized that the National Labor Relations Act requires the employer to bargain with the representative of the majority of his employees.

The obligation is not contingent upon a certification; indeed, the Board requires the employer to recognize the majority agency upon a showing of such representation in the absence of formal determination.[13]

Once the employer recognizes the majority representation of the union, its status is presumed to continue, and

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[13] *N.L.R.B. v. Clinton Woolen Mfg. Co.*, 141 F. (2d) 753 (C.C.A. 6th, 1944); *N.L.R.B. v. Hollywood-Maxwell Co.*, 126 F. (2d) 815 (C.C.A. 9th, 1942); *Foote Bros. Gear & Mach. Corp. v. N.L.R.B.*, 114 F. (2d) 611 (C.C.A. 7th, 1941); *N.L.R.B. v. Remington Rand*, 94 F. (2d) 862 (C.C.A. 2d, 1938).

the obligation of the employer to bargain likewise continues. Even the employer's personal belief that the union has lost the support of the majority of the employees does not relieve him of the obligation to bargain with the recognized union. The sole lawful basis for refusal to deal is the certification of another union issued by the Board after it has found through its own instrumentality of election that another union has won a majority.

Thus, in *N.L.R.B. v. Whittier Mills Co., etc.,* 111 Fed. (2d) 474 (C.C.A. 5th, 1940), the Board had certified the Textile Workers Organizing Committee in November, 1937. The company, in defense of a charge of refusal to bargain in 1939, claimed that the union had lost its majority. The Court upheld the Board's charge of unfair labor practice saying:

> "The statute does not say how long a certificate of representation shall stand good. It is not intended to be ephemeral, nor should it be perpetual. On general principles, since it ascertains a status as existing, *the presumption is that the status continues* until shown to have ceased. The employer is, in theory at least, not much concerned since the employees are to choose their representative unhindered."

Likewise, in *National Labor Relations Board v. Piqua Munising Wood Products Company,* 109 Fed. (2d) 552 (C.C.A. 6th, 1940), the Court recognized the well-established rule that a majority once established is presumed to continue until the contrary is shown. In this connection the Court said:

> "Respondent's contention that some of the cards lack probative value because dated in 1935 and 1936

is without merit. It is a well-established rule of evidence that when the existence of a personal relationship or state of things is once established by proof, the law presumes its continuance until the contrary is shown or until a different presumption arises from the nature of the subject matter. *National Labor Relations Board v. National Motor Bearing Co.,* 9 Cir., 105 F. (2d) 652."

Many Circuit Court decisions confirm this generally recognized rule;[14] indeed, it is announced by the Supreme Court in *Medo Photo Supply Corp. v. National Labor Relations Board,* 321 U. S. 678, 64 S. Ct. 830 (1944). There the employees had designated a collective bargaining representative but shortly thereafter, and before any agreement had been reached between the representative and the employer, a majority of the individual employees in the unit, without revoking the designation of the union as their representative, requested the employer to bargain directly with them as a group. The Board and the Court, Justice Rutledge dissenting, found that the employer's acquiescence in this request constituted a refusal to bargain. The Court ruled the obligation of the employer to bargain with the union continued despite the claim upon the employer of the alleged majority to deal with them directly.

The Supreme Court has further held the presumption of continuing representation will withstand a petition of a majority of the employees that they desire to revoke

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[14] *N.L.R.B. v. Appalachian Electric Power Co.,* 140 F. (2d) 217 (C.C.A. 4th, 1944); *N.L.R.B. v. Botany Worsted Mills,* 133 F. (2d) 876 (C.C.A. 3rd, 1943), cert. denied 63 S. Ct. 1164 (1943); *N.L.R.B. v. Federbush Company,* 121 F. (2d) 954 (C.C.A. 2nd, 1941).

the authorization of the agency. In an opinion ultimately upheld by the Supreme Court, the Board points out that the "advantages" of stability in bargaining relations required it to uphold the representation of the incumbent union despite the petition of the majority which would revoke it. Thus in *National Labor Relations Board v. Century Oxford Manufacturing Corporation,* 140 F. (2d) 541, cert. denied, 323 U. S. 714, 65 S. Ct. 40 (1940) the Board said:

> "Problems arising from alleged shifts of allegiance following Board elections are among the most difficult with which this Board is confronted. In considering such allegations, the Board must balance the advantages of stability in collective bargaining against the desirability of affording employees full freedom of choice of representatives. The Board has attempted to achieve a balance between these conflicting policies by refusing to entertain representation petitions within a reasonable period after an election, except where unusual circumstances intervene. Without such a rule, collective bargaining would be deprived of stability, and administrative determinations would become ephemeral. In a case such as this, where no such unusual circumstances are present, no reasonable doubt can be entertained concerning the continued efficacy of a certification."[15]

While the petition of a majority of its employees filed with the employer is not sufficient, according to the Board, to rebut the presumption of continuity of representation of the incumbent union, the petition of 30% of the workers filed with the Board succeeds in doing so. If, however, the majority of the employees do not rebut the presump-

[15] 47 N.L.R.B. 835 at 846 (1943).

tion of continued representation by filing a petition with an employer the minority petition before the Board should be no more effective.

We submit that the cases uniformly hold that once an employer recognizes a bargaining agency as the representative of the workers, the right of that union to representation is presumed to continue. The right withstands representations or claims made by employees that they would prefer another union.

The Board has likewise held that the right of representation withstands ineffective proceedings before the National Labor Relations Board. Thus in the matter of *Grieder Machine Tool and Die Company,* 49 N.L.R.B., 1325, enforced in *N.L.R.B. v. Grieder Machine Tool and Die Company* (C.C.A. 6th, 1944), 142 F. (2d) 163; cert. denied 323 U. S. 724, 65 S. Ct. 56 (1944), the Board held that, in a case in which it refused to issue a notice of hearing upon the rival's petition, the employer was still obligated to deal with the incumbent union despite the petition.

The rule has a particular applicability to the present case. As we have pointed out *supra,* the Board dismissed the representation proceedings initiated by FTA-CIO in the instant case because that union did not comply with the Labor Management Relations Act of 1947. Since the entire representation proceedings have thus been dismissed and dissolved, the parties must revert to the *status quo* which prevailed prior to the institution of the matter. The dismissed petition in the instant cases is in the same position as the dismissed petition in the *Grieder* case. In that situation the Board held the abortive pro-

ceedings did not excuse the employer from bargaining with the incumbent union; in the instant case the dissolved proceedings could not make it unlawful for the employer to continue to bargain with the established union.

It seems obvious that the filing of abortive or invalid petitions cannot change the relationship of the parties. The proceedings are dismissed as of the date that they commenced. The Board must leave the parties as it finds them; it cannot create rights in non-complying or non-representative unions by reason of the filing of void petitions.

Any other determination of this matter in the instant case would place a premium upon petitions filed by non-complying labor organizations. Under the Board's *Midwest* doctrine, non-complying unions would be able to halt the bargaining of the complying, incumbent organization by the act of starting representation proceedings. Non-complying organizations through filing successive petitions could thereby arrest the process of bargaining by complying organizations in perpetuity. Certainly the Act does not intend to grant so drastic a power to a non-complying labor organization.

It therefore must follow that in the instant case the dismissed petition of the non-complying labor organization does not affect the rights of the incumbent union and the employer. With the dismissal of the petition the parties revert to the *status quo*. The presumption that the recognized agency continues to represent the majority applies; the sole attack upon the right of representation falls in the dismissed proceedings.

Even in cases in which the concurrent representation proceedings have not been dismissed the Courts have held the rights of incumbent unions do not terminate until a new bargaining agency is actually certified. We shall point out that the Board's contrary position finds no support in the cases.

1. The Courts do not support the Board's doctrine.

The Board contends that the filing of the petition for certification by FTA-CIO, which consummated in two abortive elections, invalidates the continuation of the incumbent AFL's bargain rights during the interval of these proceedings.

While the Board has amassed a plethora of cases on general propositions, rather than on this specific one, we do not intend to pad this brief with decisions which are not on the issue. There are really no decisions of the Courts which uphold this attempt of the Board at administrative legislation. There are, however, decisions which hold the opposite.

We submit that this Circuit Court of Appeals has twice decided this issue adverse to the Board's contention. In the first instance, this Honorable Court rejected the Board's present contention in its decision in *National Labor Relations Board v. Bercut-Richards Packing Co.,* No. 9499, which involved the same facts as we probe here. In the second instance we submit this Court in another decision, as well as other Circuits and the Supreme Court in cases involving the present issue, refused to follow the Board's cease-bargaining theory.

a. This Honorable Court in its recent decision in National Labor Relations Board v. Bercut-Richards Packing Co., No. 9499, rejected the Board's contention that the pendency of representation proceedings prevented the continuance of bargaining relations.

As the Board has noted, the instant case is part of the so-called Bercuit-Richards proceedings.[16] This Court has had occasion to pass upon the present plea of the Board in the Bercut-Richards litigation, and it rejected that contention.

That litigation[17] emanated from an attempt of the Board to claim a contempt on the part of the employer association (C. P. & G.) of the previous decree[18] of this Court, which in substance forbade a violation of the National Labor Relations Act. The Board contended in that case, as it does here, that the continued exclusive recognition of AFL during the pendency of representation proceedings, and the extension of existent contractual provisions, violated the decree and the Act.

In return to the Rule to Show Cause[19] the employers and AFL admitted the existence of the challenged con-

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[16]"During July, August and September, pursuant to appropriate orders of the Board, consolidated hearings, in which the various employers, including respondent, were represented, were held on these petitions in what has come to be known as the Bercut-Richards Case (R. 22-23, 126; Matter of Bercut-Richards Packing Co., et al., 64 N.L.R.B. 133)," Board's Brief, p. 3.

[17]*National Labor Relations Board v. Bercut-Richards Packing Co.*, No. 9499 in the United States Circuit Court of Appeals for the Ninth Circuit.

[18]The decree was made and entered by this Court on July 15, 1940.

[19]The Rule to Show Cause directed to the respondents, required them to file an answer to the Board's petition "specifically admitting, denying, or meeting by an affirmative defense, every material allegation of the said petition, setting forth in short and plain terms each and every defense, including the material matters of time and place."

tract and defended its legality. Joining issue, the Board vigorously contended the contrary, and this point was argued on the merits orally by all parties and briefed by the employers and the AFL.

When this Court denied the petition to adjudge the employers in contempt, without written opinion, the Board realized that unless the decision could be confined to a procedural ruling, further proceedings in that case would be barred. Hence on July 23, 1946, the Board filed its application for clarification of the decision. This Court denied the application.

Since the decision of this Court was not without prejudice, and since this Court refused upon the Board's subsequent application to restrict it to a procedural ruling, this Court, it must be presumed, decided the matter upon the merits.

The commentators[20] and the Courts agree that a decision of a Court having jurisdiction constitutes a decision on the merits and is *res adjudicata* of the issue unless otherwise specified.

The applicable Federal Rules of Civil Procedure articulate the general rule.[21] Rule 41b provides—

> "*Involuntary dismissal; effect thereof.* For failure of the plaintiff to prosecute or to comply with these

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[20]See Freeman on Judgments, Secs. 626, 633, 641, 684, 687, 708.

[21]The rules of the Ninth Circuit provide as to enforcement of Board orders: "Excepting as above set forth the rules governing appeals shall apply, after the filing of the record." As to appeals the rules expressly provide: "The Federal Rules of Civil Procedure, whenever applicable, are hereby adopted as a part of the rules of this Court with respect to appeals in actions of a civil nature."

rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. In an action tried by the court without a jury the court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52 (a). *Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.*"

The dismissal in the *Bercut* case could not have been for lack of jurisdiction, since this Court took jurisdiction; and, of course, there was not the slightest suggestion by any party of an improper venue.

The Supreme Court of the United States has itself declared that a decree, such as this, which is on its face absolute, "goes to the merits." In *Lyon v. Perin and Gaff Manufacturing Co.*, 125 U. S. 698, 31 L. Ed. 839 (1888) a decree of dismissal was entered upon complainant's default and failure to appear. To the contention that the dismissal did not bar a subsequent proceeding, the Court answered:

"This decree on its face is absolute in its terms, is an adjudication of the merits of the controversy,

> and, therefore, constitutes a bar to any further litigation of the same subject between the same parties. As was said by this court in *Durant v. Essex Company,* 74 U. S. 7 Wall. 107, 109 (19:154, 156): 'A decree of that kind, unless made because of some defect in the pleadings, or for want of jurisdiction, or because the complaint has an adequate remedy at law, or upon some other ground which does not go to the merits, is a final determination. Where words of qualification, such as "without prejudice," or other terms indicating a right or privilege to take further legal proceedings on the subject, do not accompany the decree, it is presumed to be rendered on the merits.' " (p. 702.)

More recently the Supreme Court reiterated the rule in *Napa Valley Electric Company v. Railroad Commission,* 251 U. S. 366, 64 L. Ed. 310 (1920). In this case it was urged as a defense that the California Supreme Court had dismissed without opinion a prior petition of the Electric Company to review a decision of the California Railroad Commission.[22] Affirming the decision of the District Court, the Supreme Court said,

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[22]The District Court dismissed the bill and upheld the contention that the prior decision was *res judicata,* stating (257 Fed. 197):

> "The contention by plaintiff that the ruling of the state court is not a proper predicate for invoking the doctrine of res judicata in that it is not a judgment 'on the merits', but purely a negative determination or refusal to assume jurisdiction, is unsound. We are bound to assume, if we accept the averments of the bill, that the petition put that court in full and complete possession of all the facts upon which it relies here * * *; and that being true, the denial of the petition was necessarily a final judicial determination * * * based on the identical rights asserted in this court, and it was between the same parties. Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact * * *" (p. 199.)

"In other words, the substance of the contention is that the court, instead of hearing, refused to hear; instead of adjudicating, refused to adjudicate; and that from this negation of action or decision there cannot be an assertion of action or decision with the estopping force of res judicata assigned to it by the district court.

"Counsel, to sustain the position that he has assumed and contends for, insists upon a literal reading of the statute and a discussion of the elements of res judicata. We need not follow counsel into the latter. They are (372) familiar and necessarily cannot be put out of mind, and the insistence upon the literalism of the statute meets in resistance the common, and at times, necessary, practice of courts to determine upon the face of a pleading what action should be taken upon it. * * *"

"And (373) we agree with the district court that 'the denial of the petition was necessarily a final judicial determination, based on the identical rights' asserted in that court and repeated here. (*Williams v. Bruffy,* 102 U. S. 248, 255, 26 L. ed. 135, 137.) And further, to quote the district court, 'Such a determination is as effectual as an estoppel as would have been a formal judgment upon issues of fact.' *Calaf v. Calaf,* 232 U. S. 371, 58 L. ed. 642, 34 Sup. Ct. Rep. 411; *Hart Steel Co. v. Railroad Supply Co.,* 244 U. S. 294, 299, 61 L. ed. 1148, 1153, 37 Sup. Ct. Rep. 506.

"The court held, and we concur, that absence of an opinion by the supreme court did not affect the quality of its decision or detract from its efficacy as a judgment upon the questions presented, and its subsequent conclusive effect upon the rights of the Electric Company. Therefore the decree of the District Court is affirmed."

As we have demonstrated above, a dismissal without opinion is presumably an adjudication upon the merits and bars a subsequent proceeding. In view of Rule 41 (b) of the Federal Rules of Civil Procedure that presumption is conclusive and irrebuttable. This Honorable Court's decision, therefore, must compose an adjudication upon the merits of the present issue; it involved exactly the same question as the Board seeks to redetermine in the present proceedings.

b. The United States Supreme Court, as well as a number of Circuit Courts and State Supreme Courts, have refused to follow the Board's attempted administrative legislation that the pendency of representation proceedings works a cease-bargaining order upon the employer and the incumbent union.

This Honorable Court squarely held the bargaining relationship of the incumbent union and the employer is not quashed by the filing of representation proceedings by a rival union in a case which long predated the *Bercut-Richards* and present litigation.

In *National Labor Relations Board v. Pacific Greyhound Lines, Inc.,* 106 F. (2d) 867 (C.C.A. 9th, 1939), a labor union, the Amalgamated Association of Street, Electric Railway and Motor Coach Employees, upon a showing of representation to the employer, entered into a collective bargaining contract with the employer, which, among other matters, provided that either party could terminate it upon sixty (60) days' prior notice to December 31, 1938, or prior to December 31 of any ensuing year. Thereafter a rival union, the Brotherhood of Railroad Trainmen, attempted to organize the employees. On June 7, 1938, Amalgamated filed a petition for certification; on June 10, 1938, the Brotherhood of Railroad Trainmen did

likewise. The Board directed an investigation; from June 23 to 27 it held hearings, and on October 29 issued its decision and direction of elections.

Two days thereafter the Greyhound and Amalgamated modified the existing closed-shop agreement to provide that it could be terminated by Greyhound or the incumbent bargaining agent, the Amalgamated, upon 60 days' written notice by either party at any time, instead of upon sixty (60) days' notice prior to December 31 of the year.

This Court did not support the Board's contention that the modification of the agreement during the pendency of representation proceedings constituted a violation of the Act. This Court said:

> "Prior to the elections and on or before October 31, 1938, the closed-shop agreement was modified so that it could be terminated by either Greyhound or the then bargaining agent for the men, Amalgamated, on 60 days' written notice from either party to the other. By thus shortening the time for termination of the agreement, Greyhound and the employees, through the Amalgamated, facilitated the opportunity for a new bargaining agent to terminate the closed-shop agreement if one were selected at the approaching elections.
>
> "We are unable to find in this modification of the agreement any justification for the Board's charge that it constituted a contempt of our decree or any violation of the Act. On the contrary, it seems in aid of the Act's declared purpose of a speedy disposition of labor disputes. *We regard the contract, as modified, then to be binding on the employees and on the company and not affected by the*

fact that undetermined proceedings were pending before the Board. Consolidated Edison v. N.L.R.B., 305 U. S. 197, 237."

The *Greyhound* decision is impressive because there the representation proceedings were actually initiated by the contracting union, while, here, they emanated from the petition of the challenging union only. Despite the dual invocation of the Greyhound representation proceedings and despite the fact that the contracting union itself first commenced them, this Court still allowed the contracting union to continue to bargain. That union occupied a weaker position than AFL did here; yet this Court held that its bargaining rights were not affected by the question of representation which it had itself raised.[23]

This Circuit Court is not alone in rejecting the Board's thesis that representation proceedings prevent continuity of bargaining relations.

The Fifth Circuit, in the case of *N.L.R.B. v. McGough Bakeries,* 153 Fed. (2d) 420 (C.C.A. 5th, 1946) reached a similar result. In this case the Court considered the validity of a Board order requiring reinstatement of em-

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[23]We are surprised at the Board's cavalier treatment of the Court's express language in this case. (Board's Brief, p. 19.) The Board claims the ruling rested "on the narrow ground of failure to state facts within the scope of the outstanding decree", but this argument ignores the above quoted language of this Court. That language likewise belies the Board's loose statement: "The question of whether the continued recognition of one of the unions constituted a violation of the Act was, therefore, never decided by this court." (Ibid.) The employer certainly granted the union "continued recognition" when it continued to contract with it. The Board would erase the facts as well as this Court's explicit and succinct ruling.

ployees discharged under a closed-shop contract with an independent union. The company signed the contract two months after the independent union had filed a petition for investigation of representatives, and after the competing CIO union had filed a charge alleging that the independent union was company-dominated. The Board found the independent union to be company-dominated, and ruled the discharges pursuant to the independent union's request to be illegal. The Court, however, held the evidence as to company domination insufficient, and sustained the contract with the independent union, despite the pending proceedings.[24]

In the case of *Peninsular & Occidental Steamship Co. v. National Labor Relations Board, et al.,* 98 Fed. (2d) 411 (C.C.A. 5th, 1938), cert. den. 305 U. S. 653 (1938) setting aside 6 NLRB 959 (1938), the Circuit Court rejected the Board's contention that the employer violated the Act in that it executed and enforced a union shop contract after it learned of its employees' change in union affiliation and before the National Labor Relations Board determined the question of representation. In this case, the

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[24]The Board's defense to this case is that, although representation proceedings were pending when the parties entered into the contract, "the Board did not thereafter act upon the petition because preliminary investigation indicated to it that the contracting union was illegally dominated. The unprocessed petition was regarded as having lapsed * * *" (Board's Brief, p. 19.) Here FTA-CIO's petition has, in similar fashion, not been acted upon because the Board ruled that the union had not complied with the provisions of the Act. (See p. 7, supra.) The petition, here, too, has been treated as lapsed. If the filing of a petition, which is subsequently allowed to lapse, does not defeat the existing bargaining relationship, neither can the filing of the abortive petition of the non-complying FTA-CIO. Moreover, the Board's argument here conflicts with its decision in the *Grieder* case, supra, p. 43.

crews of two ships, the *Florida* and the *Cuba,* transferred their membership from the International Seamen's Union to the National Maritime Union. In the words of the Court, "the company had asked the Board to designate the proper bargaining agency at the beginning of the trouble" between the two unions, but, despite the fact that the Board did not make such designation, the company entered into a union shop contract with the International Seamen's Union. When the company discharged employees who refused to conform with the union shop provisions of that contract, the Board proceeded with unfair labor practice charges, following a procedure similar to that invoked here. As the Court said:

> "The Board declined to give effect to the existing contract between the company and the International Seamen's Union on the ground that a majority of the crews belonged to the National Maritime Union and the company had made no effort to ascertain the proper bargaining agency before the contract was made." (p. 414.)

Rejecting the Board's position, the Court held:

> "The right of an employer to make a contract with a labor union and to require membership therein as a condition of employment is expressly recognized by the Act. 29 USCA par. 158 (3). The contract with the International Seamen's Union was a valid, existing agreement at the time the crews were discharged, and no other bargaining unit had been designated. Under its terms the company was obliged to give its members preference in re-employment." (p. 414.)

Thus two other Circuit Courts have concurred with this Court in its rejection of the Board's position here; likewise, the Court of Appeals of New York has, in a parallel situation under the State Labor Relations Act, refused to follow the State Board in the same particular.[25] While the United States Supreme Court has not passed upon the present issue, it has indicated its belief that the Act does not prohibit interim contracts of a limited nature during the pendency of representation proceedings.

In *Consolidated Edison Company, etc., et al. v. National Labor Relations Board,* 305 U. S. 197 (1938), a decision relied upon by this Court in the *Greyhound* case, the Supreme Court upheld contracts of the incumbent union covering its membership despite the Board's contention that they were "invalid because made during the pendency of the proceedings." The proceedings not only involved unfair practice charges against the employer on the ground the incumbent union was company-dominated, but an election to determine the choice of the employees as between the incumbent and a rival union. While the Supreme Court ruled on a different type of contract than

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[25]The Court of Appeals of New York held in *Triboro Coach Corporation v. New York State Labor Relations Board*, 286 N. Y. 314, 36 N. E. (2d) 315 (1941), a case arising under the provisions of the New York State Labor Relations Act:

> "It is urged that, since the Board had determined that a controversy existed among the employees as to the appropriate representative to bargain with the employer *and had issued an order for an election to determine such controversy* prior to the time of the making of the 1939 agreement, Triboro's knowledge of such action by the Board suspends the right of the employer to enter into a contract with the selected representatives of a majority of the employees. *The act does not so provide.*"

is involved here, it faced the same basic question: the propriety of the continuation of contractual relations with an incumbent union during the course of representation proceedings by the Board. The Supreme Court, recognizing the value of contractual relations in preserving industrial peace, upheld the right of the employer and the incumbent union to continue their relationship. The Court held that any discrimination of the employer resulting from his continuing to contract with the incumbent union did not impede the democratic processes of the Act.[26]

The general philosophy of the Supreme Court therefore seems to recognize the desirability of settled contractual relationships as against the plea that such contracts may impair fluidity of choice in the selection of a bargaining agency. It has held that pending proceedings do not necessarily halt collective bargaining.

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[26] "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. The 80 per cent of the employees who were members of the Brotherhood and its local, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining * * * *Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had th right to make their own choice * * * They contain no terms which can be said to 'affect commerce' in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.*" (p. 236.)

As we have pointed out *supra,* this concept has been applied by a number of Courts to the specific situation here involved. We shall point out that the Board fails to submit any contrary decisions that specifically support it.

2. The cases cited by the Board do not support its doctrine.

We now briefly analyze the decisions cited by the Board.

The Board begins by setting out the cases on page 9 of its brief to sustain the proposition that in an election, in which a *single* union is seeking the right of representation, "the employer may not become a participant". The Board does not throw any light upon the present issue by amassing cases to illustrate this legal platitude. The Board continues to "prove" the obvious by arraying seven more decisions for the proposition that in a *multiple* contest of unions for representation, "the employer may not enter the race" (Board's Brief, p. 10) by according special advantages to any union. The question here is whether the observation of the *status quo* by the employer, the continued recognition of the existing bargaining agency and the extension of the contractual conditions, accords special advantages to the incumbent, or whether the destruction of the *status quo* by the reversal of the existent situation would not accord special advantages to the challenger.

The general propositions and cases cited by the Board do not even purport to answer this question.

The Board now (p. 12) advances to the defense of its finding that respondents unlawfully aided the AFL by continuing to recognize it during the pendency of pro-

ceedings. The Board particularly contends the "advantage of a closed shop" renders "well-nigh impossible" a free election, overlooking the fact that the Board in ordering the first election during the course of a closed shop contract found nothing "impossible" about it.

According to the Board's present-day notion of the matter, "The status of exclusive bargaining representative affords a union the unique prestige of speaking to the employer in behalf of all employees in the union" and the Board cites two Supreme Court cases for that proposition, *J. I. Case Co. v. N.L.R.B.*, 321 U. S. 332 and *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192.

In the first case, the Supreme Court held that *individual* labor contracts, negotiated by the company and its workers, could not serve as an excuse for the company to refuse to bargain collectively with the designated agency. But the Court does not even remotely by decision or *dicta* sustain the Board's cease-bargaining contention here.

The Court, however, does indicate that if the mechanism prescribed by the Act fails in some manner to designate the majority representative, the employer is free to deal with his workers collectively or individually, as he pleases.

> "The conditions for collective bargaining may not exist; thus a majority of the employees may refuse to join a union or to agree upon or designate bargaining representatives or the majority may not be demonstrable by the means prescribed by the statute, or a previously existent majority may have been lost

> without unlawful interference by the employer and no new majority have been formed. As the employer in these circumstances may be under no legal obligation to bargain collectively, he may be free to enter into individual contracts." (p. 337.)

If anything, the language of the Court indicates that if the bargaining agency is "not demonstrable by the rules prescribed by the statute" or the "new majority representative" has not been designated, the employer is completely free, even to enter into individual contracts. It would follow that he was free likewise to enter into a combination of individual contracts or a collective contract. Thus, if anything, the case supports our position here rather than the Board's, which attempts to spell out a prohibition of the employer's freedom to act under the specified circumstances.

The second case, cited by the Board, a very well-known decision, holds that a collective bargaining representative under the Railway Labor Act undertakes the obligation of representing all employees without discrimination. The case throws no light upon the present issue.

The Board next contends that the workers "will naturally prefer an organization with which his employer has already demonstrated a willingness to deal." (Brief, p. 13.) This supposed attraction is speculative, as we have pointed out. (See Sec. 5, A, IV.) Moreover, if the concept is true, the fact that the employer *has* been willing to deal with the incumbent composes an historical fact that even the Board cannot erase.

While the Board claims the Supreme Court early recognized that "once an employer has conferred recognition on a particular organization it has a marked advantage over any other in securing the adherence of employees" (*N.L.R.B. v. Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 267, cited Board's Brief, p. 13), the decision does not advance the Board's position. In the *Pennsylvania Greyhound* case, the company had sponsored and recognized a *company dominated union,* and the Court sustained the Board's finding of an unfair labor practice. No contention is made in our case that the AFL was company dominated.

Moreover, the "marked advantage", mentioned by the Court, which the union obtains by recognition, was granted by the Board in its Second Direction of Elections to the rival FTA-CIO. The Board ordered the employer to confer recognition on a challenging union which had made no showing that it represented a majority of the employees. For the employer to confer recognition on such an organization would indeed afford it a "marked advantage" over the AFL in any future election. Yet the Board, here, *gave* it to the challenger.

The language of the Supreme Court confirms our contention that the Board's attempt to force the employer to confer recognition on the challenging organization through dealing with it on an equal basis with the incumbent donates to the challenger a distinct advantage. The Board would in effect permit the challenging organization to divert a confirmed recognition from an incumbent to itself.

The Board cites a number of cases to the effect that the grant of exclusive recognition by an employer, at a time when the majority status of the union is in doubt, constitutes unlawful assistance to the union. The Board cites here, as well as elsewhere in its brief, cases that hold an employer commits an unlawful labor practice when he contracts with a company-dominated or company-assisted union. Since these acts of assistance are in themselves unfair labor practices, these decisions do not make out the Board's case.

Thus in *International Association of Machinists v. N.L.R.B.*, 311 U. S. 72 (1940), the Supreme Court held that the International Association of Machinists, which had been granted a closed shop contract despite the known claim of another union, was assisted by acts of discrimination, by intimations of the employer's choice of unions, by silent approval of the membership drive of the favored union and by close surveillance of the rival union. These acts constituted unlawful labor practices in themselves and were the basis upon which the Board set aside the closed shop contract. No such unfair practices took place here.

In the second case cited, *N.L.R.B. v. National Motor Bearing Co.*, 105 F. (2d) 652 (C.C.A. 9th, 1939), the employer likewise discriminated against the union, whom it knew to represent a majority of its workers, by closing down the plant rather than negotiate with the bargaining agency. Thereupon the employer entered into a closed shop contract with a rival union. The Court sustained the Board's finding that the employer had discriminated

against the majority representative of the employees and thereby committed an unfair labor practice.

In the case of *N.L.R.B. v. John Engelhorn & Sons,* 134 Fed. (2d) 553 (C.C.A. 3rd, 1943), the case next cited by the Board, the Court holds that the contract of the employer with a contesting labor organization cannot be supported if it runs to a union favored by employer's activities. Before executing the questioned contract, the employer had assisted the union by statements of supervisors to employees indicating preference for it. The Court says:

> "The first (proposition) is that the employer may not raise for his protection in this proceeding a closed shop contract made with Local 174 at a time when the employer knew that an investigation and certification proceeding instituted by a rival labor organization, claiming a majority of the employees, was pending. The Board in accordance with its previous decisions, so held. *This proposition of law does not* seem to *have been squarely decided by any court decision. Nor need we decide it here, for we consider the second line of attack sufficient. We think, as did the Board, that the agreement was invalid in view of the employer's activities attending its execution.*" (p. 555.)

> "The case is thus one where the employer negotiates a closed shop contract with a labor organization which he assisted by conduct defined by Act to be an unfair labor practice. Such a contract is invalid under the proviso of par. 8 (3) of the Act." (p. 557.)

In the Board's next case, *N.L.R.B. v. Southern Wood Preserving Co.,* 135 F. (2d) 606 (C.C.A. 5th, 1943), the Board and the Court found that the employer had encouraged one of two rival unions in many ways in addition to signing the contract with the assisted union. We refer to the following language in the Court's decision:

> "We think also that the circumstances, especially the discharge of Turner, and the premature signing of a new contract with the Engineers' Union and the unusual facility afforded of shutting down the plant to vote on it, are sufficient to show a support by the employer of that Union as against its rival, contrary to the National Labor Relations Act. Financial support is not the only kind of support forbidden." (p. 607.)

Finally, the Board cites *Elastic Stop Nut Corporation v. N.L.R.B.,* 142 F. (2d) 371 (C.C.A. 8th, 1944). In this case the contract emanated from a labor organization which the Board and the Court found, in the first place, to have been assisted by the employer, and, in the second place, to have had no previous bargaining history with the employer. The Court in that case said:

> "The Board inferred from the evidence that the employees did not freely select the Association as their bargaining representative, and that the contract was not a contract negotiated for them by their freely chosen representative. In those circumstances there had been no settling of labor relations; the employees were still attending organizational activities and attempting to decide on their union affiliations. Since recognition was accorded to an 'assisted' union, and the contract entered into with the assisted union, both the recognition and contract may be regarded

as ineffective to settle the collective bargaining matters in issue at petitioner's plant." (p. 378.)

In the instant case there is no contention that AFL had been dominated or assisted by the company. On the other hand, the record showed the employer bargained with AFL for many years previous to the present contract.

N. L. R. B. v. Waterman Steamship Corp., 309 U.S. 206, cited on page 16 of the Board's brief is another case in which discrimination and assistance, independent of the contract of the incumbent union, composed a direct violation of the Act. As the Court points out, the Board charged the company "had been guilty of a most flagrant mass discrimination against its employees" (p. 208) in violation of the Act, in that the employer discharged the entire crews of vessels "because of the crew's C.I.O. affiliation". The Court sustains the Board's finding of discrimination on this ground. That, in itself, is a complete distinction between the *Waterman* case and ours.

The Board (Brief, p. 17) alludes to a further finding of the Court as to discrimination, failing to quote the entire sentence of the Court, which reads as follows:

> "Enough has been shown to establish the reasons for the Board's decision that if the Company was to permit any opportunity for contact with the men, a fair election required that equal opportunities be given to both the C.I.O. and the A.F. of L." (p. 226.)

The Court refers to the refusal of the company to issue passes to C.I.O. representatives, although that privilege was afforded to A.F.L. representatives. Obviously the

isolation of crews on vessels from normal contacts emphasizes the effect which any unilateral privilege of access would have upon them. In our case, instead of finding such discrimination, the Board concluded that the C.I.O. had no ground for complaint on this score. Hence, the powerful and determinative discrimination of the *Waterman* case does not occur here. That factor is a second distinction between the *Waterman* case and the instant one.

The Board cites (Brief, p. 21) *Local 2280 v. N.L.R.B.*, 158 F. (2d) 365 (C.C.A. 9th, 1946), a decision of this Court, for the proposition that the continuance of the closed shop provision of the involved contract would permit the "A.F.L. (to) pick and choose the electorate in the forthcoming election by preventing the employment of its opponents * * *" (Brief, p. 20), But the Board grossly misreads the cited case, since it holds only that the closed shop contract may not be used to effect the discharge of those who electioneer for the challenging union.

The Court recognizes that "Such (closed shop) contracts are generally drawn, as here, in the anticipation that *during their currency there will be elections* * * *". (p. 368). The employee "otherwise complying with the (contracting) union's membership requirements" (p. 369) is entitled to protection from discharge for expressing his choice. "Employers may well be perplexed by borderline cases of fact as to whether their employees' dismissals from a closed shop union are for such electioneering for a rival union *or for some of many other union reasons warranting their dismissal*". (p. 369.) The Court thus

clearly confines its decision to a discharge of an employee under a closed shop contract for his activities on behalf of the rival union. The decision does not hold, but impliedly denies, that the closed shop contract in itself prevents a freedom of choice by the employees.

Indeed, in the light of the Board's contention that a closed shop contract permits the contracting union to "pick and choose" the electorate, the following statement of this Court is significant.

> "In many closed shop elections as much as forty percent of the voters vote for a union of which they are not members 'for the purpose of taking the collective bargaining rights away from' the union which the closed shop agreement compelled them to join." (p. 369.)

The Board's argument, here, obviously fails because, so long as the rule of this Court's decision in the *Local 2280* case, is observed, and employers are not discharged for their activities on behalf of the challenging union, there is nothing to prevent them from voting down the union in which they hold membership by reason of the closed shop.

N.L.R.B. v. American White Cross Laboratories, 160 F. (2d) 75 (CCA 2nd, 1947) cited by the Board (Brief, p. 21) follows and cites the above decision of this Honorable Court.

The Board's citations conclude (p. 21) with a list of Board decisions following its case of *Matter of Midwest Piping & Supply Co., Inc.,* 63 N.L.R.B. 1060. Upon that decision the Board's present case rests; yet, it, too, is distinguishable from the present facts. In the *Midwest*

Piping & Supply Co. case there had been no previous contractual relationship such as in the instant one. A "members-only" contract with the Steamfitters had expired almost a year before the assailed contract was consummated. In the instant case, the contractual relationship between the parties continued; the chain of contractual relationship remained unbroken. Such was not the case in the *Midwest Piping & Supply Co.* case.

We submit in conclusion of this analysis of the Board's cases, that the cited decisions do not support the *Midwest* doctrine. The Board has presented a quantitative analysis, collecting large numbers of cases to support generalized propositions, but it has not cited a single decision of the Courts supporting its contention that an employer must cease dealing with a recognized union when a rival organization files a petition for certification.

V. CONCLUSION.

The Board's petition in this case rests upon a doctrine which must, as it did here, result in a breakdown of collective bargaining for a long and indefinite period. To hold that a rival union can halt long-continued bargaining by an incumbent union and an employer by the mere act of making a claim for representation is to disrupt stable relations and to invite jurisdictional strife.

The Board's theory that collective bargaining can stop is academic. Labor relations are a condition precedent to conducting any business. The Board's attempted three year hiatus of bargaining in the instant case exposed one of the Nation's leading industries to possible collapse.

No Court has ever supported this extreme and unrealistic doctrine of the Board. Recent cases of the Board show that it, too, is questioning the position it originally took here.

We submit that the relevant decisions and the underlying postulates for industrial peace require the dismissal of the petition.

Dated, San Francisco,
June 28, 1948.

Respectfully submitted,
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